Harcharan Singh s/o Sohan Singh v Ranjit Kaur d/o S Gean Singh (sued as the administratrix of the estate of Bhagwan Singh s/o Sohan Singh, deceased)

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–471 OF 1998
KAMALANATHAN RATNAM J
16 APRIL 2003

Contract — Oral agreement — Proof of — Whether there was evidence to establish existence of an oral agreement

Probate — Administration — Administration action — Letter of administration — Revocation of — Whether there was sufficient to cause — Probate and Administration Act 1959 s 34

The plaintiff was the younger brother of the deceased while the defendant was the wife of the deceased. The property in question was purchased by the plaintiff and the deceased and was registered in both their names. Though the defendant had been estranged from the deceased since 1965, the defendant became the administratrix of the deceased's estate. On the basis of an agreement that the plaintiff alleges between the plaintiff and the deceased for the latter to sell his half of the share in the land to the former, the plaintiff now prays for a declaration that he is the beneficial owner of the half undivided share in the said property which belonged to the deceased and an order that the defendant as administratrix of the deceased's estate transfer the half undivided share in the said property to the plantiff.

Held, dismissing the plaintiff's claim:

(1) The plaintiff had failed to prove the averment that there was an agreement between him and the deceased where he alleged that the latter had agreed to sell half of his share to the former. In fact, the plaintiff had not even attempted to transfer the half undivided share of the deceased during the lifetime of the deceased (see para 32).

(2) Section 34 of the Probate and Administration Act 1959 allows the plaintiff to apply to revoke or amend the grant of probate or letters of admininstration 'for any sufficient cause' and surely on the basis of the plaintiff's allegation that he owned the entire property and if he was able to prove it, this constituted sufficient cause. Yet the plaintiff did nothing although he knew when his brother died and yet he expected the defendant to apply for the grant and then to transer the half-share to him. Since the planitiff had the opportunity to apply to revoke the grant to the defendant and did not do so, the half-share of the deceased remains property vested in the estate of the deceased for the interest in the said half-share to the distirbuted to the beneficiaries of the deceased (see para 52).

[**Bahasa Malaysia summary**

Plaintif adalah adik lelaki kepada si mati sementara defendan adalah isteri si mati. Hartanah yang dipersoalkan telah dibeli oleh plaintif dan si mati dan didaftarkan dalam nama kedua-duanya. Walaupun defendan telah berpisah dengan si mati sejak tahun 1965, defendan telah menjadi pentadbir harta pusaka si mati. Berdasarkan perjanjian yang plaintif katakan antara plaintif dan si mati untuk si mati menjual bahagiannya dalam tanah tersebut kepada plaintif, plaintif sekarang memohon satu deklarasi bahawa beliau adalah pemilik benefisiari separuh bahagian yang tidak diagihkan dalam hartanah tersebut yang dimiliki oleh si mati dan satu perintah agar defendan sebagai pentadbir harta pusaka si mati memindahkan separuh bahagian yang tidak diagihkan dalam hartanah tersebut kepada plantif.

Diputuskan, menolak tuntutan plaintif:

(1) Plaintif telah gagal untuk membuktikan penegasan bahawa terdapat satu perjanjian antara beliau dan si mati di mana beliau mengatakan bahawa si mati telah bersetuju untuk menjual bahagiannya kepada beliau. Walhal plaintif tidak cubapun untuk memindahkan separuh bahagian si mati yang tidak diagihkan semasa hayat si mati (lihat perenggan 32).

(2) Seksyen 34 Akta Probet dan Pentadbiran 1959 membenarkan plaintif memakai untuk membatlkan atau meminda kebenaran probet atau surat-surat pentadbiran 'for any sufficient cause' dan sememangnya atas asas pengataan plaintif yang beliau memiliki keseluruhan hartanah dam jika beliau dapat membuktikannya, ia membentuk sebab yang mencukupi. Namun plaintif tidak berbuat apa-apa walaupun beliau mengetahui yang abang beliau meninggal dunia dan begitupun beliau mengharapkan defendan untuk memohon geran tersebut dan kemudian untuk memindahkan separuh bahagian kepadanya. Memandangkan planitif mempunyai peluang untuk memohon untuk pembatalan geran tersebut kepada defendan dan tidak berbuat demikian, separuh bahagian si mati kekal sebagai hartanah dalam harta pusakan si mati untuk kepentingan dalam separuh bahagian tersebut diagihkan kepada benefisiari-benefisiari si mati (lihat perenggan 52).

Notes

For cases on administration actions, see 11 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1996–1998.

For cases on proff of oral evidence generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2132–2142.

Cases referred to

Bashir v Commissioner of Lands [1960] 1 All ER 117 (refd)
Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119 (refd)

Legislation referred to

Contracts (Malay States) (Amendment and Extension) Act 1974 s 4
Evidence Act 1950 ss 114(g), 157
Law of Property Act 1925 [UK] s 40(1)
Limitation Act 1953 ss 9(1), 32
Registration of Titles Ordinance 1919 [Kenya] s 83
Statute of Frauds [UK] s 4

Dato' Mahinder Singh (Mahinder Singh Dulku & Co) for the plaintiff.
Balwant Singh (Balwant Singh & Co) for the defendant.

Kamalanathan Ratnam J:

Facts

[1] The plaintiff is a retired school teacher and is the younger brother of Bhagwan Singh s/o Sohan Singh, deceased ('the deceased'). The defendant is the widow of the deceased and the adminstratrix of the deceased's estate. The defendant had been estranged from the deceased since 1965. The subject property of this suit is Lot 1217, Section 3, Town of Air Itam, North East District, Penang together with the house erected thereon bearing postal address No 513 Hill Railway Road, Penang held under Grant No 31641 ('the said property').

[2] The said property was purchased jointly by the plaintiff and the said deceased on 3 May 1963 at the price of RM18,000 and was registered in the joint names of the Plaintiff and the deceased. The plaintiff and the deceased paid RM9,000 in equal shares for the purchase of the said property and the balance RM9,000 of the purchase price was borrowed by way of an overdraft from the Overseas Chinese Banking Corporation Ltd ('OCBC') on the security of the said property. The overdraft account was opened at OCBC in the joint names of the deceased and the plaintiff.

[3] The said property was initially used as a family residence and was occupied by the parents and siblings of the plaintiff and the deceased. The defendant separated from the deceased in early 1966 and took with her the three sons born of the marriage. Thereafter, the defendant had no contact with the deceased or his family. The deceased occupied the said property at various intervals until his death on 4 August 1990. The deceased died at the age of 56 after surgery. The plaintiff contends that the deceased's medical and funeral expenses were borne by him and that neither the defendant, nor her three sons, attended the funeral or the 17th day prayers despite an announcement regarding the death of the deceased having been made in the newspapers.

[4] The said property remains in the joint names of the plaintiff and the deceased and remains mortgaged to OCBC to-date. The plaintiff had been servicing all the interest on the overdraft account with OCBC to-date and also has paid for the maintenance and other outgoings in respect of the said property.

[5] The defendant and the deceased remained separated until the death of the deceased. The defendant had on 17 December 1997 obtained a grant of letters of administration ('LA') of the deceased's estate. In April 1998, the defendant through her solicitors offered to the plaintiff to purchase the half undivided share in the said property registered in the name of the deceased and the plaintiff replied stating that the plaintiff is the beneficial owner of the whole of the said property.

The plaintiff's claim

[6] The plaintiff's claim is for:

(1) a declaration that the plaintiff is the beneficial owner of the half undivided share in the said property previously belonging to the deceased;

(2) an order that the defendant as administratrix of the deceased's estate do transfer the said half undivided share in the said property to the plaintiff;

(3) an order that the plaintiff shall be at liberty to proceed with the registration of the said transfer referred to in para (2) above at the appropriate land registry;

(4) an order directing the Registrar of Land Titles, Penang and/or other appropriate registering authority to do all such things as may be necessary to give effect to the order to be made;

(5) an injunction restraining the defendant whether by herself, her servants or agents or otherwise howsoever from causing to be transferred into her name or as she may direct the said half undivided share in the said property or dealing with the aforesaid share in the said property in any manner whatsoever until the trial of this action; and

(6) costs.

The plaintiff's case

[7] It is the plaintiff's case that sometime in early 1965, the deceased had, due to his family and financial problems orally offered the plaintiff to purchase the deceased's half undivided share in the said property subject to the existing charge to OCBC at the price of RM4,500. The said offer was made in the presence of both their parents, brothers and sisters.

[8] The plaintiff testified that the defendant was opposed to the purchase of the said property and had never occupied the said property at any time. The plaintiff further testified that the deceased was unable to service the interest payments in respect of the overdraft facility from OCBC and that he had, since the purchase of the said property, solely serviced the interest payments levied by OCBC on the loan. He also paid all bills relating to the said property and had solely maintained the said property.

[9] The plaintiff contended that he orally accepted the deceased's said offer and paid the deceased the agreed purchase price in instalments between 16 April 1965 to 10 May 1967.

[10] The said instalments were paid as follows:

Table 1

Date	Cheque No	Amount (RM)
16 April 1965	121269	1,000
24 April 1965	121270	700
23 December 1965	376807	500
16 January 1967	179178	1,500
10 May 1967	197189	2,000
	TOTAL	5,700

[11] In the meantime, the plaintiff said it was agreed that the said property would remain in the joint names of the deceased and the plaintiff until such time as the plaintiff required the said property to be transferred into his name or as he may direct. The overdraft account too remained in the joint names of the deceased and the plaintiff but the plaintiff solely utilised the said facility and exclusively operated the said account. After the plaintiff had moved out of the said property shortly after his marriage in 1971, all bank statements pertaining to the said overdraft account were sent to the plaintiff's subsequent address.

[12] The plaintiff contends that upon payment of the agreed purchase price for the deceased's half undivided share in the said property on or about 10 May 1967, he became the beneficial owner of the deceased's said half share in the said property and thereafter the deceased held the half undivided share in the said property as a bare trustee for him pending the formal transfer of the same to him or as he might direct.

[13] The plaintiff further contends that, in the circumstances, the half undivided share of the said property registered in the deceased's name did not and does not, in law, form part of the deceased's estate and that the defendant wrongfully obtained the grant of LA of the deceased by including the said half undivided share in the said property as part of the personal estate of the deceased, when in fact the plaintiff was the beneficial owner of the whole of the said property.

The defence

[14] The defendant denies any personal knowledge of the arrangement between the plaintiff and the deceased to pay the purchase price of the said property. The defendant also denies that the deceased was faced with financial or family problems and denies any personal knowledge of the oral agreement between the plaintiff and the deceased for the purchase by the plaintiff of the deceased's half undivided share in the said property.

[15] The defendant maintains that she is the lawful administratrix of the estate of the deceased which included the half undivided share in the said property registered in the name of the deceased. The defendant further contended that the plaintiff's claim is barred by the law of limitation and that the oral agreement is not valid and is unenforceable.

Findings of the court

Basis of the plaintiff's claim

[16] The plaintiff's main contention appears in para (5) of the statement of claim where he alleges that in early 1965 the deceased, Bhagwan Singh, due to his family and financial problems, offered to sell his half share in the said property to the plaintiff for RM4,500.

[17] The plaintiff also pleaded that:

(i) the defendant objected to the deceased joining in the purchase of the property and because of this had quarrelled with the deceased;

(ii) consumption of alcohol by the deceased contributed to his financial problem;

(iii) the deceased was unable to service the interests. It is trite that the plaintiff has to prove what he alleges and that the burden is commensurately heavy as the allegations are serious and in this case the allegations relate to a contract to sell a landed property.

[18] In support of the allegations in his examination-in-chief, the plaintiff when asked what the nature of the marital problem of the defendant and her husband was answered by saying that the defendant had locked out the deceased when he went back to Ipoh after the purchase of the property in protest and that this was told to him by the deceased. Firstly, this piece of evidence on which the plaintiff relies, is uncorroborated. It is settled law that a person cannot corroborate himself yet it would seem that s 157 of the Evidence Act 1950 enables a person to corroborate his testimony by his previous statement. Section reads as follows:

> In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

[19] But in this case, no where else has the plaintiff made this statement which could be used to corroborate his evidence on this in court. In any case, I accept and adopt the reasoning of Raja Azlan Shah FJ (as His Highness then was) when he said in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 at p 120:

> As for myself, although the previous statement made under s 157 is admissible as corroboration, it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In my opinion the nature and extent of the corroboration necessary in such a case must depend on and vary according to the particular circumstances of each case. What is required is some additional evidence rendering it probable that the story of the witness is true and that it is reasonably safe to act upon it. If a witness is independent, ie if he has no interest in the success or failure of a case and his evidence inspires the confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinize all the infirmities in that evidence before deciding to act upon it.

[20] The defendant on the other hand said that she had no reason to object to the deceased purchasing half the property because it was going to be used as a home for both families and as indeed it was. But what is important is that the defendant denied that she had locked out the deceased. The plaintiff's sister PW2 also testified that the deceased had told her that on the night of the purchase of the property the defendant had locked him out and that the deceased has then gone to her house to sleep. Whilst the evidence of this witness might be taken to corroborate the story of the deceased being turned out of his house by the defendant, a court has to test the credibility of a witness not just on one piece of evidence but on her entire testimony. PW2 testified as did the plaintiff that the defendant had not seen the said property. In fact, PW2 went so far as to assert that the defendant had never stepped into the said property since it was purchased. However when she testified, the defendant said that the deceased had taken her to see the property before the purchase. Later, after much intensive cross-examination and when asked how many people were staying in that property in 1963 she said it was her husband's parents, brothers and sisters. When asked how many bedrooms there were in that house, she answered that there were three bedrooms upstairs and a big hall downstairs and that she used to share with her sister-in-law who was small then.

[21] I have watched the defendant testify. She exuded straightforwardness in her answers and spoke with clarity. She did not take time to reflect on her answers and responded always spontaneously. In fact, the court had to request her to go slow with her answers so that the court could write them down.

[22] But in any case, even assuming the defendant had locked the deceased out, could one such incident be the cause of the 'family problem' that the plaintiff alleged the deceased was undergoing. In any event,

according to PW2 her deceased brother had complained to her that he was locked out only because he had shared in the purchase of the house, since the deceased's family did not agree to the purchase; but the defendant said she was happy with the purchase. As to the locking of the deceased out of the house, she explained that she did not lock the door but would just close it and that in case he returned late she would leave the door unlocked. I therefore find that the allegation of the defendant having locked the deceased out of the house, even if it is true could not have been the linch-pin of the deceased's and the defendant's marital problem.

[23] I have also considered the evidence of PW2 who, when cross-examined on this issue and when it was put to her that at the material time, that is at the time of the purchase of the property, there were no problems either family or financial to prevent the deceased from purchasing the property, agreed with this suggestion.

[24] The next issue raised by the plaintiff was that the habitual consumption of alcohol by the deceased had contributed to his financial problems and therefore he was unable to service the interest. The plaintiff also said that the cause of his consumption of alcohol was due to the defendant's marital problem. The basis for such conclusion was that the deceased had told him so. Other than the allegation that the deceased had told him, the plaintiff has led absolutely no evidence to support his case that the deceased had marital problems which led to his excessive drinking and which led to his financial problems. In contrast, PW2, the deceased sister, said in evidence that the deceased had no financial problems at that time and this was supported by the evidence of the defendant who maintained that the deceased had no financial or family problems in early 1965.

Servicing of the bank

[25] I accept the evidence of the defendant when she said that her husband had told her that the plaintiff and his family were occupying the said property and on that score had agreed to look after the house and also to effect all necessary payments.

[26] PW2, the plaintiff's sister testified that because the deceased was staying in Ipoh, the plaintiff occupied the said property and took care of all bills and repairs to the property in question. She further agreed that as the deceased did not make any claim for any rentals, the plaintiff had agreed to take care of all outgoings of the said property and likewise since the deceased was staying in Ipoh, the plaintiff had agreed to service the overdraft facility as he was occupying the said property. In re-examination too she said that since the plaintiff's entire family was staying in the said property, the plaintiff agreed to service the overdraft facility and that the deceased could not service the overdraft facility as he had financial problem.

[27] I find that the truth lies somewhere in between PW2's answers. I find that since the deceased was living in Ipoh and since the plaintiff lived with his entire family in the said property, the plaintiff had indeed agreed to service the overdraft facility and the quit rent and assessment and repairs.

Financial problem

[28] Whilst the plaintiff merely gave oral evidence of the deceased's financial problems because of which the deceased had to sell his half-share, the income tax returns of the deceased for the year ending 1965 certainly does not suggest that he was having financial problems. Dato' Mahinder for the plaintiff pointed out that since the statement of income for year ending 1965 as furnished by the deceased to the Tax Department did not mention the said property, this meant that the document had acknowledged that the property had indeed been sold to the plaintiff. I do not accept this argument. On the contrary, I accept the submission of Mr Balwant for the defendant that since the statement reflected income, and since the deceased derived no income from the said property he had not mentioned it in the said statement. This to my mind is a more reasonable explanation for the omission of the said property from the said statement. The plaintiff had pleaded that due to his family and financial problems the deceased had offered the plaintiff the sale of his half undivided share in the said property. He who alleges must prove. This is the basic tenet of the rule of law. It is my judgment that the plaintiff has merely alleged but has not proven the allegations. Since the basis of his claim has fallen, the plaintiff's entire claim must therefore fail.

The alleged payment by the plaintiff

[29] The plaintiff had shown that he had made payments between 16 April 1965 to 10 May 1967 amounting to RM5,700. But all that the plaintiff was required to pay was only RM4,500. To proof payment towards the purchase price the plaintiff tendered cheque-butts showing that the five cheques were issued to the deceased. When asked why he overpaid by RM1,200, the plaintiff said it was for the deceased's personal use. But that was not what the plaintiff had pleaded. He had pleaded that the said instalments were paid for by those five cheques. Surely, the plaintiff could have at least written on the cheque-butts that the payment was towards settlement of the purchase price. After all according to the plaintiff, the deceased was in financial difficulties and he was a habitual drinker. The plaintiff is no simpleton. He is a teacher. I am unable to accept the plaintiff's story that the payments were towards the purchase price.

[30] Very significantly, the plaintiff had used the words 'personal use' on two cheque-butts. Whatever reason the plaintiff might have had for issuing those cheques to the deceased, I am satisfied that it cannot be as payment towards settlement of the purchase price.

Plaintiff's failure to transfer deceased's share to himself

[31] If as the plaintiff had testified he had made payment of the last cheque on 10 May 1967, I cannot understand why the plaintiff did not immediately convert the overdraft facility solely into his name and with the consent of the bank, transfer the deceased's half-share into his name. When questioned on this, the plaintiff testified that he had asked a bank officer

who had told him that there was no guarantee that he would get the same facility if the earlier charge was discharged. This bank officer was not called and I must invoke s 114(g) of the Evidence Act 1950 against the plaintiff and presume that if that officer had been called his evidence would not have supported what the plaintiff had testified to. I must therefore reject this evidence as hearsay. There is therefore no plausible explanation for the plaintiff to have done nothing to enforce his right over the undivided half share of the property.

[32] The plaintiff did make the last instalment payment on 10 May 1967. Why did he not then transfer the property to his name during the lifetime of the deceased. He did not do anything for 23 years. After all he had testified that the deceased had financial, marital and drinking problems. Any prudent person would have, immediately at the first opportune moment, exercised his right to the half share and transferred the said half share from the ownership of such a risky person, even if he is one's own brother, to his name. But in this case, the plaintiff surely must have known that with the defendant having separated from the deceased and with the three male children, who certainly will grow up to demand their rights, it would be patently foolhardly not to have transferred the property during the lifetime of his brother, who had in the words of the plaintiff, sold the half share in the property to him. Considering all these facts, I can arrive at only one conclusion. The plaintiff did not want to attempt to transfer the said property during the lifetime of the deceased because the deceased would have resisted any suggestion that he had indeed sold the property to the plaintiff.

[33] After the death of his brother, the defendant obtained LA on 17 December 1997. In applying for the grant, the defendant had disclosed that the deceased had left a half share in the said property and the defendant valued her half-share at RM300,000. However in granting the LA, the estate duty valued the said half-share at RM248,000.

[34] I accept the defendant's evidence that she had offered to sell her half share at the said price or agreed to purchase the plaintiff's half share at that price. It is significant to note that the plaintiff instituted these proceedings only after obtaining a copy of the grant of LA with the valuation at RM248,000 annexed thereto, after corresponding with the defendant's solicitor.

[35] When asked why he himself did not apply to transfer the said property to his name after the death of his brother, the plaintiff replied that he had expected the defendant to obtain the grant of LA and then to transfer the deceased's half-share to him. Firstly, this does not make sense. After all, according to the plaintiff, the defendant and her sons never attended the deceased's funeral which was held in his house and at his expense. If the defendant would not even attend the deceased's funeral why would the plaintiff expect the defendant to go through the trouble of obtaining the grant of LA and then transferring the said property to the plaintiff.

A Limitation

[36] The defence has raised limitation and the plaintiff argued that the law of limitation does not apply because the cause of action only arises from the breach and further that the law of limitation does not apply to a purchaser in possession.

B **[37]** In the statement of claim, the defendant had pleaded that upon payment of the purchase price the deceased became a bare trustee of the property 'pending the formal transfer'. It seems clear that by his own pleading, the plaintiff has recognized and admitted to his right to the transfer of the property and that such right had accrued to him upon the C payment of the purchase price.

[38] It would seem that s 9(1) of the Limitation Act 1953 would bar the plaintiff from proceeding with this claim. The said section. reads as follows:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it D first accrued to some person through whom he claims, to that person.

[39] I therefore find that on his pleadings, time started to run from the date he issued the last cheque, ie on 1 May 1967 because as of this date the right of action, meaning the right to claim the deceased's half-share, had accrued to him. Since this action was filed 31 years later, s 9(1) is a clear bar.

E **[40]** In any event, s 32 of the same Act will also apply against the plaintiff. It reads as follows:

> Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

F **[41]** It is clear to my mind that not proceeding to enforce one's right for 31 years constitutes excessive delay. The word 'otherwise' in s 32 of the Limitation Act 1953 must include delay. Besides, this excessive delay has not, in my view been satisfactorily explained.

[42] As for the plaintiff's contention that the law of limitation does not G apply to a 'purchaser in possession', it is a fact from the plaintiff's own evidence that he went into possession of the property as soon as he had jointly purchased it with the deceased and not from the time of the alleged sale of the half-share by the deceased to the plaintiff. In such circumstances, the plaintiff cannot be considered a 'purchaser in possession'.

H The memorandum in writing

[43] The alleged completion of the sale of the half-share pursuant to the alleged last payment by cheque took place on 10 May 1967. It would seem therefore that at the material time the English Law of Contract was applicable in Penang.

I **[44]** It was only on 1 July 1974 by the introduction of the Contracts (Malay States) (Amendment and Extension) Act 1974 (Act A239) that English law ceased to apply in Malacca, Penang, Sabah and Sarawak.

Section 4 of the said Act reads as follows:

> The English law of contract to the extent that it conflicts with the Ordinance shall cease to have effect within Malacca, Penang, Sabah and Sarawak.

[45] In *Bashir v Commissioner of Lands* [1960] 1 All ER 117, The Privy Council was called upon to interpret s 83 of the Registration of Titles Ordinance 1919 of Kenya. The said section reads as follows:

> If the rent or royalties or any part thereof reserved in a lease under this ordinance shall at any time be unpaid for the space of thirty days after the same has become due, or if there shall be any breach of the lessee's covenants, whether express or implied by virtue of this ordinance the commissioner may serve a notice upon the lessee specifying the rent or royalties in arrear or the covenant of which a breach has been committed, and at any time after one month from the service of the notice may commence an action in the Supreme Court for the recovery of the premises, and, on proof of the facts, the Supreme Court shall, subject to relief upon such terms as may appear just, declare the lease forfeited, and the commissioner may re-enter upon the land. In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity.

[46] Lord Jenkins in delivering the judgment of the court said at p 127 as follows:

> In their Lordship's opinion, the reference to English law must extend to statute law, inasmuch as relief from forfeiture is virtually the creature of statute, and the statute law referred to must be the statute law in force at the date when s 83 became law.

[47] Since English law includes statutes, the defendant before me argued that s 4 of the Statute of Frauds which was re-enacted as s 40(1) of the Law of Property Act 1925 of England must apply. The said section reads as follows:

> No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof is in writing, and signed by the party to be charged, or by some other person thereunto by him lawfully authorized.

[48] The defendant therefore argued that since no memorandum or note in writing and signed by the party to be charged, namely the deceased or by someone whom the deceased had legally authorized to sign, has been produced, the plaintiff ought not to be allowed to proceed with the action. For the purposes of this particular case I agree. But it must be noted as did Arulanandom J, in *Kok Ek Chooi v Cheah Soon Neoh & Anor* [1982] 1 MLJ 219 that the said section does not specify the matters that the notice or memorandum must contain. I would hold that any conduct by the party to be charged, that leads the party bringing the charge to believe that the party to be charged would follow through with his obligations under the contract, must surely give rise to the equitable remedy of specific performance.

[49] Counsel for the plaintiff referred to the Federal Court decision in *Wan Naimah v Wan Mohamad Nawawai* [1974] 1 MLJ 41 and submitted

that the English Statute of Frauds did not apply to Malaysia. This is not the correct interpretation of the words of Suffian Chief Justice. In that case, the land had been sold to the parties' father but the land was transferred to the brother-in-law of the purchaser. Subsequently, the whole land was transferred to the appellant, the daughter. The respondent, the son of the purchaser, was then still an infant. There was evidence to show that the father intended to create a trust of an undivided half share in the land in favour of his son, the respondent. The learned trial judge found that the appellant held the half-share in the land in trust for the respondent. The appellant appealed. In dismissing the appeal, the Federal Court held that on the facts the learned trial judge was right in holding that the half-share in the land was held by the appellant, the registered proprietress, in trust for the respondent.

[50] The context in which Suffian Chief Justice held the English Statute of Frauds inapplicable is best appreciated if the entire passage of Suffian Chief Justice is reproduced from pp 41–42 of the said judgment. It reads as follows:

> The law is that a declaration of trust may be made quite informally, provided that the words used are clear and unequivocal. As was stated by Romilly MR in *Grant v Grant* words declaring a trust:
>
> > 'need not be in writing … They must be clear, unequivocal and irrevocable, but it is not necessary to use any technical words, it is not necessary to say, "I hold the property in trust for you", nor is it necessary to say, "I hold the same for your separate use". Any words that the donor means at the time he speaks, to divest himself of all beneficial interest in the property are, in my opinion, sufficient for the purpose of creating the trust. I think that it is also sufficient for the purpose of showing that the trust has been created, if he afterwards states that he has so created the trust, though there was no witness except the donee present at the time the trust was created.'
>
> The Master of the Rolls was speaking of a declaration of trust in respect of chattels, which may be created by parole, but as a trust in respect of land may be created in Kelantan also by parole the English Statute of Frauds does not apply. We are of the opinion that the principle above stated is applicable to this case.

[51] What Suffian Chief Justice meant was that since a trust in respect of land may be created in Kelantan also on parole evidence, therefore the English Statute of Frauds which required some memorandum or note in writing was inapplicable.

No revocation of the grant of LA

[52] The plaintiff had pleaded that the defendant had wrongfully obtained the grant of letter of administration by including the half-share as part of the estate of the deceased. In fact, s 34 of the Probate and Administration Act 1959 allows the plaintiff to apply to revoke or amend the grant of probate or letters of administration 'for any sufficient cause' and surely on the basis of the plaintiff's allegation that he owned the entire property and if he was able to prove it, this constituted in my view, sufficient cause. Yet the

plaintiff did nothing although he knew when his brother died, and yet he expected the defendant to apply for the grant and then to transfer the half-share to him. Since the plaintiff had the opportunity to apply to revoke the grant to the defendant and did not do so, the half-share of the deceased remains properly vested in the estate of the deceased for the interest in the said half-share to be distributed to the beneficiaries of the deceased. Since no order of revocation of the grant had been made in favour of the plaintiff, the plaintiff's relief prayed for to have the said half-share of the deceased transferred to him by the defendant as administratrix of the deceased's estate is misplaced and premature. He should have the grant revoked and then he ought to pray for the declaration he now seeks.

[53] Having considered all issues, I hereby dismiss the plaintiff's claim with costs. The defendant's counterclaim had been withdrawn by the amendment.

Plaintiff's claim dismissed.

Reported by Mariette Peters-Goh